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Supreme Court of the United States

OCTOBER TERM, 1950

No. 50

CARL JACOB KUNZ,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF

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Opinions Below

No opinion was written by the Magistrate who tried the case (30) or by the Appellate Part of the Court of Special Sessions (41)—except that the latter Court, in its order, cited an earlier New York case as authority for upholding the challenged ordinance. In the Court of Appeals of the State of New York three opinions were written: by Judge Desmond for the majority (46-49), by Judge Conway in dissent on the ground that the ordinance was void as applied (49-61) and by Judge Bromley, with the concurrence of Judge Fuld, on the ground that the ordinance was void on its face (62-64). These opinions are reported in 300 N. Y. 273.

Statement of Jurisdiction

This Court has jurisdiction under Title 28 U. S. C. § 1257, this being an appeal from a final judgment of the highest Court of a state which has upheld a municipal ordinance challenged as repugnant to the United States Constitution.

both on its face and as applied to appellant. The judgment was rendered December 29, 1949. Application for appeal was presented on March 16, 1950. The appeal was allowed March 21, 1950. This Court noted probable jurisdiction on May 15, 1950.

The Statute Involved

Appellant challenges an ordinance of the City of New York known as Administrative Code Section 435-7.0. It reads as follows:

> "a) PUBLIC WORSHIP—It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or render any pretense therefor, in any street. A clergyman or minister of any denomination, however, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher or lay-reader may conduct religious services, or any authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism may preach or expound such cause, in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. This section shall not be construed to prevent any congregation of the Baptist denomination from assembling in a proper place for the purpose of performing the rites of baptism, according to the ceremonies of that church.
>
> "b) INTERFERENCE WITH STREET SERVICES—It shall be unlawful for any person to disturb, molest or interrupt any clergyman, minister, missionary, lay-preacher or lay-reader, who shall be conducting religious services by authority of a permit issued hereunder, or any minister or people who shall be performing the rites of baptism as permitted herein, nor shall any person commit any riot or disorder in any such assembly.

"e) VIOLATIONS—Any person who shall violate any provisions of this section, upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars, or imprisonment for thirty days, or both."

It should be noted, however, that the application for a permit prepared by the police commissioner under this ordinance does not make any inquiry with regard to the time or place of the proposed speech. It (Ex. A, pp. 34, 35) requests information with regard to the background and training of the applicant, his qualifications, and whether or not he intends to make collections. The permit which is issued under this ordinance (Ex. B, p. 36) also contains no limitations as to time or place. The regulations issued in connection therewith, however, require the holder of the permit to notify the commanding officer of the precinct of the time and place of any street meeting (Ex. B, p. 36). It thus appears that the ordinance has been administered in such a way that a permit is granted generally without regard to traffic conditions and that whatever discretion is exercised in connection with the right to hold a meeting at a particular place has been delegated to the commanding officer of each precinct.

Statement of the Case

Appellant is a preacher who states that it is his religious practice and conviction to "go out on highways and byways and preach the word of God" (15). He reads from various Bibles and publications and attempts to refute dogmas he considers wrong or untrue particularly if the Roman Catholic version of the Bible and official Roman Catholic publications (16).

In 1946 appellant spoke at Hanover Square in the City of New York while holding an annual permit issued by the Police Department. On or about November 7, 1946, this permit was revoked by a letter handed to appellant

by a policeman while appellant was speaking (20). The revocation stated that, after hearings held, the commissioner was of the opinion that appellant "contrary to the provisions of law under which the permit was issued, ridiculed and denounced religion", the letter stating, "I am, therefore, in the exercise of discretion as provided by law, revoking your permit effective forthwith" (21). Appellant then filled out the required application form for the next year, 1947, but his application was "Disapproved" (20). His application for 1948 was also "Disapproved" (19, Ex. C, p. 37). On September 11, 1949, appellant spoke at Columbus Circle without a permit and was given a summons by Francis T. Sullivan, the complaining police officer (5-7).

There was no charge of interference with traffic or other disorder. Appellant was not charged with ridiculing or denouncing any form of religious belief or practice. The charge was *solely* violation of the section by conducting a religious meeting without a permit.

Appellant, at the end of the People's case, moved to dismiss the complaint on the ground that Section 435-7.0 is invalid on its face and that its operation and its application to him abridges his freedom of religion and speech as guaranteed by the First and Fourteenth Amendments to the Federal Constitution as well as under parts of the State Constitution (13, 14). The motion was denied (14). The motion was renewed at the end of the entire case (28-30) and again denied (30).

The New York Court of Appeals considered the constitutional issues urged by appellant and rested its decision on the ground that the challenged ordinance did not violate the United States Constitution (49).

Questions Presented

We have, without substantial change, reformulated the questions presented in the statement as to jurisdiction heretofore filed (pp. 9 and 10) as follows:

I. The ordinance is void on its face because it prescribes no standards.

II. The ordinance is void because it restricts the right to speak on religious subjects to particular categories of persons.

III. The ordinance is void because it requires previous registration as a condition of exercising the right to speak.

IV. The ordinance as applied to appellant is void because it interferes with freedom of religion and of speech.

Specification of Error

The New York Court of Appeals erred in affirming appellant's conviction.

POINT I

The ordinance is void on its face because it prescribes no standards.

Judges Bromley and Fuld of the Court below reached the conclusion that this ordinance was totally void (62-64) on the ground that it provides no limit to the discretion of the police commissioner. Such an ordinance is clearly void under numerous decisions of this Court: *Lovell* v. *City of Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 446; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Saia* v. *New York*, 334 U. S. 558.

The majority in the Court of Appeals sustained the ordinance on the theory that the police commissioner was obliged to issue a permit as a matter of course to those qualified under the law (47). But the difficulty is that the ordinance was not acted upon in accordance with that construction. And, indeed, the Court of Appeals read more into the ordinance—for it authorized refusal to issue a new permit once an old one had been revoked for supposed violation of conditions we maintain are unconstitutional. That being so, no valid standards for the exercise of any discretion by the police commissioner remain.

POINT II

The ordinance is void because it restricts the right to speak on religious subjects to particular categories of persons.

The ordinance not only sets up a permit system, but entirely prohibits all persons from speaking on the public streets on any subject which has to do with public worship or exhortation, atheism or agnosticism, except those belonging to a very limited category. The persons allowed to speak are ministers, persons regularly "associated" with a church or incorporated missionary society, and lay preachers or readers. These persons may conduct religious services. Discussion of atheism or agnosticism is limited to authorized representatives of incorporated organizations devoted to such causes. There is, finally, an exemption allowed to Baptists for the purpose of performing the rites of baptism.

While the statute on its face appears to be limited to a prohibition against the conduct of religious services, the statute has been construed to cover any discussion of religious subjects both in the case at bar and in the earlier case of *People* v. *Smith*, 263 N. Y. 255. Such a statute constitutes an improper interference by the state with

freedom of religion. It involves in effect a determination by the state of what constitutes a religious cause. In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court condemned such an attempt under circumstances which might more readily have justified state regulation. There the state required a permit in connection with solicitation of funds for religious purposes. Mr. Justice Roberts held the statute void because it empowered the licensing authority to determine whether or not the cause was a religious one. He said at page 305:

> "He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."

Cf. *Jamison* v. *Texas*, 318 U. S. 413.

So here the police commissioner is authorized to withhold his approval if he determines that the individual desiring to exercise his religious freedom does not come within the prescribed categories or if he determines that a particular group does not constitute a church or missionary society. In effect he has the same wide powers of broad censorship which the Court has condemned.

POINT III

The ordinance is void because it requires previous registration as a condition of exercising the right to speak.

If the section were free from other objectionable features and is to be considered a requirement merely for identification or previous registration, it would nevertheless be incompatible with an exercise of the rights of free speech and assembly. As this Court said in *Thomas* v. *Collins*, 323 U. S. 516, 539:

"As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers."

Under its most favorable interpretation, the section requires annual registration and identification as a condition to the exercise of the right to make a public speech to rally support for a religious or anti-religious cause. The Court below has construed the section to be such, at least upon the first application of a minister of religion. Even if the Court below had construed the section to give no further powers to the police commissioner, and if the section were a simple requirement for registration and identification, it would be invalid as a previous restraint. The powers of censorship and suppresssion given by the section to the issuing authority emphasize the invalidity of the section.

POINT IV

The ordinance as applied to appellant is void because it interferes with freedom of religion and of speech.

The ordinance has been upheld as valid by the New York Court of Appeals (47) on the theory that while a permit must, in the first instance, be issued as a matter of course, to a member of the limited group described in the statute, the police commissioner may revoke such a permit and refuse to issue a new one because statements made by the holder ridiculed religion and might, if renewed in the absence of police protection, result in disorder (48, 49).

1. We are not here concerned with the propriety of the remarks which appellant made, nor with the state's

right to punish him for having made them. We are only concerned with the right to ban future speech because it is claimed that past speech transgressed permissible bounds. In considering this problem it is, we submit, immaterial whether or not the past speech might have been the subject of criminal prosecution.

That there is grave doubt about the constitutionality of that part of the ordinance on which the police commissioner rested his revocation of appellant's permit (21)—that statements ridiculing or denouncing religion are punishable—the majority in the Court below recognized (49). We submit that this part of the law is unconstitutional, both on the score of vagueness (*Winters* v. *New York*, 333 U. S. 507) and as restrictive of freedom of expression (*Cantwell* v. *Connecticut*, 310 U. S. 296; *Terminiello* v. *Chicago*, 337 U. S. 1).

Since the statute could not be enforced directly by criminal prosecution it should not be capable of indirect enforcement through the device of a permit system. It would be difficult to find any strong expression of opinion which might not lead some sensitive sectarian in the audience to the belief that his own religion was being ridiculed or denounced, so that any attempt to carry out the permit system would compel speakers to "hedge and trim" (*Thomas* v. *Collins*, 323 U. S. 516, at 534, 535).

But be all that as it may, this Court has condemned attempts to prevent future expression of opinion merely because past expression had been improper: *Near* v. *Minnesota*, 283 U. S. 697. There Mr. Chief Justice Hughes expressly pointed out (p. 720) that freedom from previous restraint was not lost in cases where it was charged a crime had been committed. No principle is more firmly entrenched than that the Constitution prevents censorship of expression. That is what has been here accomplished and should be condemned.

2. It is equally immaterial that the views expressed by appellant might produce disorder. In the first place, there

was no evidence of disorder. The record shows only an admission by appellant that he had had "trouble" when no police officer was present and that he had once charged a woman listener with disorderly conduct (26, 27). Surely there was no basis for the suggestion in the Court below (49) that "religious wars" were here involved.

As Chief Justice Hughes pointed out in the *Near* case (*supra* at 722), the danger of violent reaction does not justify interference with initial expression—if it did, he said, "the constitutional protection would be reduced to a mere form of words".

And such has consistently been the position of this Court. In *Hague* v. *C. I. O.*, 307 U. S. 496, an attempt was made to justify a permit ordinance on the ground that it was designed to prevent disorder. Mr. Justice Roberts rejected that view on the ground that suppression of constitutional rights "cannot be made a substitute for the duty to maintain order in connection with the exercise of the right" (id. at 516).

There is nothing in the authorities relied on by the Court of Appeals (49) to justify the result reached here. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, this Court sustained a conviction for the use of words under particularly provocating circumstances. Here is an attempt to prevent future expression. In the *Kovacs* case, 336 U. S. 77, this Court upheld a ban on a special form of expression. There is no basis to the suggestion of the Court below that this would justify a ban on all religious discussion.

If the particular expression of views on a controversial subject might result in disorder it is the duty of the municipality to take steps to prevent the disorder. At the most it can prosecute persons who have caused the disorders—and, in a proper case, this might include the speaker (Cf. *Terminiello* v. *Chicago*, *supra*). But in no case can it prevent the speaking. We cannot do better than to quote what Judge Conway said in his dissent in the Court below (61):

"Police protection may well be necessary to secure for this defendant his constitutional right to speak freely as an ordained Baptist clergyman. The Constitution does not discriminate between those whose ideas are popular and those whose views arouse hatred and animosity—guaranteeing the right of freedom of speech to the former and withholding it from the latter. This defendant has the right to express himself concerning religious beliefs no matter how misguided and unpopular they may be and if his exercise of that right arouses passion in the community and requires the attendance of police officers, that is a small cost which must be paid by us for our continued freedom."

* * * * * * *

It follows, therefore, that neither the character of the remarks previously made by appellant, nor the possibility that disorder might ensue, justifies refusing him the right to speak. The ordinance, as here applied, is unconstitutional.

CONCLUSION

It is submitted, therefore, that the ordinance is void both on its face and as applied to appellant. His conviction under it should be reversed.

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